

MINUTES OF THE OPEN SESSION OF THE RHODE ISLAND ETHICS COMMISSION

January 25, 2005

The Rhode Island Ethics Commission held its 2nd meeting of 2005 at 9:00 a.m. at the Rhode Island Ethics Commission Conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Thursday, January 25, 2005, pursuant to the notice published at the Commission Headquarters and on the State House Library.

The following Commissioners were present:

**James Lynch, Sr., Chair James C. Segovis
Patricia M. Moran, Vice Chair* Frederick K. Butler
George E. Weavill, Jr., Secretary Barbara R. Binder
Richard E. Kirby Ross E. Cheit**

Also present were Kathleen Managhan, Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Jason M. Gramitt, Commission Education Coordinator; Staff Attorneys Dianne L. Leyden and Macall Robertson, and Commission Investigators Steven T. Cross, Peter J. Mancini, and Michael Douglas.

At approximately 9:05 a.m., the Chair opened the meeting. The first order of business was to approve the minutes of the Open Session

held on January 6, 2005. Upon motion made by George E. Weavill, Jr. and duly seconded by James C. Segovis, it was unanimously

VOTED: To approve the minutes of the Open Session held on January 6, 2005.

ABSTENTION: Richard E. Kirby.

The next order of business was advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of David Balasco, a former Legislative Director for the Governor of the State of Rhode Island. The petitioner's attorney, Robert Goldberg, Esq., informed that the Commission previously faced the same issue with regard to Mr. Balasco's predecessor. Commissioner Weavill stated that he had no problem with the petitioner lobbying the General Assembly, but requested further information regarding his relationship with other agencies in the executive branch. Mr. Balasco replied that he worked closely with the directors of various state agencies regarding bills pending before the legislature that would impact their respective agencies. He stated that the agency directors would submit their legislative agendas to his office and the Governor prior to the start of the legislative session.

In response to Commissioner Segovis, Mr. Balasco indicated that

most of his time was spent working with the legislature on different bills as a representative of the Governor's Office. Commissioner Moran observed that many of the directors with which he had interaction either have left or will be leaving their agencies. Attorney Goldberg noted that the recent change at the Department of Health (DOH) is the most significant. In response to Commissioner Cheit, Mr. Gramitt stated that the Commission previously did not distinguish between lobbying the Governor's Office and lobbying gubernatorial appointees in a matter involving the Governor's Chief of Staff due to the fact that the individual really had supervisory authority over department heads. In response to Commissioner Cheit, Mr. Balasco advised that most of his work would involve the DOH, with possibly some work involving the Department of Human Services. Commissioner Cheit stated that he would have less concern if the petitioner's primary involvement would be with the DOH.

In response to Commissioner Cheit, Ms. Leyden advised that the staff looks at the strict statutory language, as well as how the Commission has interpreted that language in prior opinions. Commissioner Kirby suggested that the legislative intent is to prevent public officials from using their prior public positions, but indicated that they must weigh that against a person's right to make a living. In response to Commissioner Butler, Mr. Gramitt stated that section 5(e) does not contain a definition of "state agency," which is defined elsewhere in the Code. He advised that, as addressed in prior opinions, the prohibitions of 5(e) do not extend to other agencies by which the

individual was not employed, but with which he or she had involvement. Commissioner Butler inquired if the opinion should offer guidance regarding how to handle causal encounters with employees of his former agency, which could be construed by the public to constitute lobbying. Mr. Gramitt replied that prior court decisions are instructive as to what constitutes lobbying, but suggested that it would be difficult to provide guidance for each circumstance with which the petitioner may be confronted. Commissioner Butler expressed that he wanted the petitioner to understand that the Commission is not insulating him from that risk.

Attorney Goldberg indicated that lobbying was defined in lobbying registration bills passed during the last legislative session and would involve an intent to influence a piece of legislation. Chair Lynch voiced his concern about the frequency with which the Commission has considered similar 5(e) issues for the past 2-3 years. He opined that the Commission must give it serious consideration during its regulatory discussions. Commissioner Segovis stated his belief that the intent of the statute is to prohibit the petitioner from working with executive branch officials with whom he had close working relationships in his prior position. He moved to amend the draft opinion to clarify that the petitioner may work with the General Assembly, but may not work on legislation with which he had prior involvement in his public position. Commissioner Cheit observed that the Commission's concern relates to prospective changes to the statute and regulations, rather than on how the law is currently

written.

Commissioner Kirby requested clarification as to whether Commissioner Segovis meant to state that the petitioner could not appear before the legislature for a period of one year on any legislation that he had previously worked on as a member of the Governor's Office. Commission Segovis affirmed his prior statement.

Commissioner Kirby concurred. Legal Counsel advised continuing the matter to a later date, given that it would be difficult to vote on the draft opinion in view of Commissioner Segovis' amendment thereto. Attorney Goldberg informed that the legislative session is well underway and hearings will soon begin. Commissioner Weavill suggested that the opinion be referred back to the staff for further drafting to incorporate recommended changes. Chair Lynch noted that the petitioner has a safe harbor letter under which he can continue to appear before the General Assembly.

Upon motion made by George E. Weavill, Jr. and duly seconded by James C. Segovis, to refer the opinion back to the staff to include language prohibiting the petitioner from appearing before the executive branch and removing safe harbor as to such appearances, there was further discussion. Mr. Gramitt requested clarification as to whether the Commission wished to treat the matter in the same fashion as its prior opinion to the Governor's Chief of Staff, allowing him to lobby the executive and judicial branches, but not the executive. Commissioner Weavill voiced his concern that the

petitioner had relationships with current DOH employees. Attorney Goldberg replied that Mr. Balasco had no supervisory authority over them in his former position. Commissioner Weavill suggested that Lifespan could have considered his access to the DOH as part of the basis for his hiring.

Commissioner Cheit inquired of Commissioner Weavill whether the fact that the DOH has a new director changes his opinion as to the petitioner's involvement with the DOH. Commissioner Weavill reiterated that he still would have access to other DOH employees with which he had worked. Chair Lynch stated the consensus to return the opinion to the staff. Commissioner Binder indicated that the safe harbor letter should stand as is and the staff should bring the draft opinion back in two weeks with more guidance on the narrow issue of whether the executive branch is an agency for the purpose of applying 5(e). She suggested that guidance could include what the federal system provides for and more information as to legislative intent. Chair Lynch expressed that the Commission cannot and should not change its interpretation solely for this opinion, but it should review it as part of its regulatory process.

Mr. Gramitt clarified that the opinion only gives safe harbor to the petitioner and does not necessarily mean that it would be a violation of the Code to take that action. Commissioner Segovis restated his second of Commissioner Weavill's original motion to return the opinion back to the staff to clarify the concerns discussed and

remove the safe harbor protection as to the executive branch. Upon the motion, it was

VOTED: To return the advisory opinion back to the staff to clarify the concerns discussed and remove the safe harbor protection as to the executive branch.

AYES: George E. Weavill, Jr., James C. Segovis and Frederick K. Butler.

Commissioner Butler noted that his vote was conditioned upon there being no proviso as to the safe harbor letter. Ms. D'Arezzo asked for clarification of the motion on the table. Commissioner Kirby suggested that they go forward with the opinion with a caveat that the petitioner cannot lobby on legislation in which he participated as a member of the Governor's Office. Ms. D'Arezzo restated the motion on the table and Commissioner Segovis withdrew his second.

Upon motion made by Barbara R. Binder to adopt the draft opinion with the proviso that the petitioner may not lobby the executive branch or any agency with which he had any dealings during his tenure at the Governor's Office, and duly seconded by James C. Segovis, there was further discussion. Commissioner Kirby inquired about legislation with which the petitioner was not really involved, but could be deemed to have been involved with because of his title. Commissioner Cheit suggested that, by virtue of his title, he

effectively would be precluded from lobbying on any bills. Upon the motion, it was

VOTED: To adopt the draft opinion with the proviso that the petitioner may not lobby the executive branch or any agency with which he had any dealings during his tenure at the Governor's Office.

AYES: James C. Segovis, Ross E. Cheit, Barbara R. Binder and James Lynch, Sr.

NOES: George E. Weavill, Jr., Frederick K. Butler, Richard E. Kirby and Patricia M. Moran.

The motion failed for lack of five affirmative votes.

Chair Lynch suggested that the members approve the staff's draft recommendation. Upon motion made by Patricia M. Moran and duly seconded by Richard E. Kirby, it was

VOTED: To adopt the staff's draft advisory opinion.

AYES: Frederick K. Butler, Richard E. Kirby, Patricia M. Moran and James Lynch, Sr.

NOES: George E. Weavill, Jr., James C. Segovis, Ross E. Cheit and Barbara R. Binder.

The motion failed for lack of five affirmative votes.

Commissioner Weavill motioned to withdraw the safe harbor letter and let the petitioner act at his peril. There was no second to the motion. Legal Counsel clarified that the safe harbor letter only applies until such time as the Commission votes upon the draft opinion and, therefore, would not provide continued protection. Commissioner Binder expressed that they should not let the petitioner leave without guidance. Upon motion made by Frederick K. Butler and duly seconded by Richard E. Kirby, it was unanimously

VOTED: To send the draft opinion back to the staff for reconsideration in light of the Commission's discussions and keep the safe harbor letter in effect.

Commissioner Kirby urged the staff not to be afraid to delineate where the petitioner may and may not appear under the current status of the law. Commissioner Butler concurred and suggested that they lay the groundwork for the direction in which the Commission wants to go in interpreting 5(e).

***Commissioner Kirby left the meeting at 10:05 a.m. and returned at 10:08 a.m.**

The next advisory opinion was that of Robert B. Holbrook, a

Commissioner of the Rhode Island Public Utilities Commission and member of the Town of East Greenwich Planning Board. Mr. Gramitt advised that this matter previously had been before the Commission and the staff has added the requested cautionary language regarding section 5(b) on page 4. Upon motion made by George E. Weavill, Jr. and duly seconded by Barbara R. Binder, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Robert B. Holbrook, a Commissioner of the Rhode Island Public Utilities Commission and member of the Town of East Greenwich Planning Board.

The next advisory opinion was that of Henry L. P. Beckwith, a member of the North Kingstown Historic District Commission. Upon motion made by Patricia M. Moran and duly seconded by Frederick K. Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Henry L. P. Beckwith, a member of the North Kingstown Historic District Commission.

RECUSAL: James C. Segovis.

The next advisory opinion was that of Peter W. Corr, the Vice Chairman of the Tiverton Planning Board. Upon motion made by George E. Weavill, Jr. and duly seconded by James C. Segovis, it was

unanimously

VOTED: To issue an advisory opinion, attached hereto, to Peter W. Corr, the Vice Chairman of the Tiverton Planning Board.

***The Commission took a brief recess at 10:30 a.m. and reconvened at 10:41 a.m.**

The next order of business was a discussion regarding Financial Disclosure Policies. Mr. Gramitt advised that the staff needs direction regarding interpreting terms in the amendment to the financial disclosure statute in order to implement disclosure for calendar year 2004. He suggested that such guidance would allow the Commission to get through the 2004 disclosure season and revisit the issue in the summer upon examination of the filing statistics. In response to Commissioner Binder, Mr. Gramitt explained that the amendment would reduce the number of municipal filers, if the Commission adopts a narrow interpretation, but noted that it does add filers on the state side. He advised that state agencies have been questioning whether other positions not specifically enumerated in the definition of “major decision-making position in a state agency” would also have to file, which could result in adding hundreds of filers. He indicated that it would be difficult for the agencies to determine who must file and it also would require individual staff determinations to be made for each position. He noted that the vague definition could present an enforcement problem for the Commission since

individuals may not be on notice that their position must file. He proposed interpreting the definition of major decision-maker to include only those enumerated positions.

Commissioner Kirby questioned whether Chief Legal Counsel to a state agency would be subject to disclosure. Mr. Gramitt replied that the position is not listed and informed that the staff could identify many additional, similar positions. He also questioned whether Legal Counsel is a major decision-maker or someone who merely advises the major decision-makers. Commissioner Kirby inquired regarding individuals who perform the functions of a particular position, but do not actually hold the title. Mr. Gramitt replied that, for example, Ms. D'Arezzo currently would not have to file, given that her official title is not that of Deputy Director. Commissioner Binder questioned whether the Deputy General Treasurer should have to file. She suggested that it would be a good idea to have the various constitutional officers list those people in their offices who are the major decision or policy makers and should have to file. Mr. Gramitt replied that it could be done at the general officer level. Commissioner Binder observed that currently some people who should be filing are not so required.

Mr. Gramitt explained that the Commission is just implementing what the General Assembly enacted regarding the filing requirements and the question is what was the legislature's intent. He also questioned how the filing requirement would be broken down in the Attorney

General's Office, whether by Deputy Attorney General alone or by the Chiefs and Deputies of the respective divisions. Commissioner Binder suggested removing the "only appears" language from the draft policy on major state decision-makers and leaving in "if." Philip West of Common Cause addressed the Commission, noting that sections 5(n) and 5(o) of the Code refer to senior policy making, discretionary or confidential positions on the staff of a state elected official or the General Assembly. He suggested that such language would include the Deputy Attorney General and the Chief of the Criminal Division.

Commissioner Kirby expressed that requiring such positions to file could be debatable if a complaint were to be filed, given that it is not clear in the statute that they would have to file. Mr. West related his concern that titles could be changed to avoid the filing requirement if the Commission focused on titles alone. Commissioner Kirby opined that if they were to require the general officers to submit a list of those who they conclude are senior officers, and a person's name is not submitted to the Commission, that person could not be subject to prosecution on a non-filing complaint. He expressed his concern about the possibility that a public employee who is not on notice that he must file could be subject to a complaint based on someone else's determination that they should file. He stated that the Commission or a constitutional officer above them should make that determination.

Commissioner Segovis stated that the onus is on agency directors

and the people in the positions to determine where they stand. He recommended amending the draft policy at the bottom of page 2 by removing “only” and adding “or its equivalent.” He also recommended adding the position of Associate Director. Commissioner Kirby noted that the draft language states “officially” and reiterated his concern regarding people functioning in positions other than just that of the title that they hold. Legal Counsel advised that adding “and or its equivalent” would negate the “officially” language. Mr. West advised that Common Cause’s intent was to substantially decrease the number of filers, particularly at the municipal level, but to draw in some people at the state level. In response to Commissioner Weavill, Mr. Gramitt stated that quasi-public corporations are included within § 36-14-2(8)’s definition of a state agency. Mr. Gramitt advised that the Commission could engage in further discussion of the issue after implementation of the amendment for the current disclosure year.

Commissioner Cheit inquired if anyone had raised the attorney client privilege issue with regard to financial disclosure. Ms. D’Arezzo explained that the issue had been raised with respect to the recent lobbying amendments, but not financial disclosure. Mr. Gramitt opined that it would not likely be raised because the statute does not require filers to identify their clients. Commissioner Segovis and Legal Counsel both indicated that that were unaware of the issue being raised in the financial disclosure context. In response to Commissioner Binder, Mr. Gramitt stated that the staff would be

providing notice of the new requirements and sending letters to the state agencies. Upon motion made by James C. Segovis and duly seconded by Richard E. Kirby to approve Section A of the draft policy regarding major state decision-makers, as amended, there was further discussion. Commissioners Binder and Cheit voiced their concerns that the adoption of such a policy would circumvent the requirements of the Administrative Procedures Act.

***Commissioner Moran left the meeting at 11:22 a.m.**

Commissioner Butler stated that he does not have the same discomfort with adopting a financial disclosure policy and expressed that the Commission should be providing guidance. In response to Commissioner Cheit, Legal Counsel opined that at the appropriate time the Commission should adopt a regulation addressing its interpretation of the statute. However, she noted that there are tight time requirements for implementing the amendment and the Commission is considering a policy to interpret that amendment at a public meeting. That does not preclude a person from challenging the interpretation at a later time.

Mr. Gramitt advised that he would be more hesitant about proceeding on a policy basis if they were broadening the statutory definition, rather than narrowing it. Commissioner Cheit expressed that it still would constitute a regulation allowing the staff to implement the statute. He indicated that the staff should just proceed and not ask

the Commission for its input. Commissioner Segovis stated that the policy captures the spirit of the statute that must be implemented. Commissioner Binder stated that the Commission could hold an emergency hearing to adopt it as a regulation. In response to Mr. Gramitt, she stated her belief that implementation of the statute would fall under the emergency regulation criteria as a peril to public welfare. She suggested that they could set a discrete time for the regulation to run out and open it up for further consideration.

Commissioner Segovis inquired whether the Commission would need enabling legislation to proceed if they implement the statute as written. Mr. Gramitt explained that the staff wished to obtain the Commission's consensus before it proceeded to interpret the statute.

Legal Counsel opined that the Commission could provide such guidance without voting. Commissioner Kirby noted that the Commission could face a challenge if it adopted an official policy without rule-making under the APA. He suggested letting the staff proceed. Chair Lynch replied that they need to give guidance to people regarding who must file. Mr. Gramitt indicated that the staff could simply interpret the statute as set forth in the draft policy. Commissioners Segovis and Kirby withdrew their motion. Commissioner Segovis suggested that the staff bring an enabling regulation before the Commission in the future.

At 11:40 a.m., upon motion made by George E. Weavill, Jr. and duly seconded by James C. Segovis, it was unanimously:

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (a)(4), for the discussion of investigative proceedings regarding allegations of misconduct and/or the discussion of litigation, and approval of minutes relating to such discussions, to wit:

a.) Motion to approve minutes of Executive Session held on January 6, 2005.

At 11:40 a.m. the Commission returned to Open Session. The next order of business was a motion to seal the minutes of the Executive Session held on January 25, 2005. Upon motion made by James C. Segovis and duly seconded by George E. Weavill, Jr., it was unanimously

VOTED: To seal the minutes of the Executive Session held on January 25, 2005.

Commissioner Cheit expressed his view that there is no reason not to publicly disclose the members' individual votes on Executive Session matters and noted that many other state agencies do so. He also stated his opposition to a blanket sealing of Executive Session minutes. Commissioner Weavill suggested that these issues be addressed at a later time. Commissioner Butler indicated he would

like to hear further discussion of the issue to fully understand its implications.

***At 11:45 a.m. the Commission took a brief recess and reconvened at approximately 12:00 p.m.**

The next order of business was an adjudicative hearing in the matters of In re: Patrick T. McDonald, Complaint Nos. 2001-41 & NF2002-13. Commissioner Kirby recused and left the meeting. A transcript of the hearing will be available in the Commission Offices. The Commission convened in Executive Session to deliberate and reconvened in Open Session at 12:55 a.m.

Chair Lynch reported that in Executive Session the Commission voted that, as to Complaint No. 2001-41, the Respondent knowingly and willfully violated R.I. Gen. Laws § 36-14-16 by his failure to file the 1999 Financial Statement. The Commission imposed a civil penalty of \$2,000 for said violation. As to Complaint NF 2002-13, the Chair reported that the Commission voted that the Respondent knowingly and willfully violated R.I. Gen. Laws § 36-14-16 by his failure to file the 2001 Financial Statement. It imposed a civil penalty of \$2,000 for said violation.

***At 12:56 a.m. Commissioner Kirby returned to the meeting.**

Chair Lynch suggested that the balance of the agenda be postponed

until the next meeting. The consensus of the Commission was to reschedule the February 8th meeting to Monday, February 7th. The Commission also directed staff to inquire as to the members' ability to meet on February 15th. At 1:00 p.m., upon motion made by George E. Weavill, Jr. and duly seconded by Barbara R. Binder, it was unanimously

VOTED: To adjourn the meeting.

Respectfully submitted,

George E. Weavill, Jr.
Secretary